

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

SCOE ASSOCIATES
Respondent

Case No.: I-00-40357

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

SCOE ASSOCIATES
Respondent

Case No.: C-01-80065

**AMENDED FINAL ORDER ON NOTICE OF INFRACTION AND
PROPOSED DECISION AFFIRMING NON-RENEWAL OF LICENSE**

I. Introduction

These consolidated matters arise under the Civil Infractions Act of 1985 (D.C. Official Code §§ 2-1801.01 *et seq.* (2001)) and Title 29 Chapter 3 of the District of Columbia Municipal Regulations (“DCMR”). Pursuant to 29 DCMR 307.4, a Proposed Decision is issued herein with respect to the June 15, 2001 Notice of Non-Renewal in Case No. C-01-80065. Pursuant to D.C. Official Code § 2-1802.03 (2001), a Final Order is issued herein with respect to the Notice of

Infraction I-00-40357. The parties will be permitted to file and serve comments as specified in this opinion.

A. The June 15, 2001 Non-Renewal Notice

By letter dated June 15, 2001 (the “Non-Renewal Notice”), the Government advised Respondent Scoe Associates Child Development Center (the “Facility”) that, pursuant to 29 DCMR 306.1(a), it proposed to deny the renewal of the child development facility license for the Facility’s 1351-B H Street, NE location. The Government based its proposed action on five charges: (1) alleged violations of 29 DCMR 311.1 (prohibiting the inspection of a child development facility) on or about March 20, 2001, March 27, 2001, May 7, 2001, May 15, 2001 and June 1, 2001; (2) alleged violation of 29 DCMR 325.13 (failure to comply with health requirements for employees of a child development facility) on or about March 30, 2001; (3) alleged violations of 29 DCMR 316.2 (failure to maintain required child staff ratios) on or about March 20, 2001 and May 25, 2001; (4) alleged violation of 29 DCMR 326.1 (failure to allow access to child development facility records) on or about March 20, 2001; and (5) alleged violation of 29 DCMR 301.6 (failure to comply with licensing requirements) on or about June 1, 2001. The Non-Renewal Notice advised the Facility of its right to a hearing prior to the proposed action in accordance with 29 DCMR 307. On June 19, 2001, this administrative court received the Facility’s timely request for a hearing on the proposed action, identified herein as Case Number C-01-80065.¹

¹ Pursuant to 29 DCMR 307.2, an applicant or existing licensee has five (5) days from the date of service of the notice of proposed action in which to request a hearing.

B. Notice of Infraction I-00-40357

By Notice of Infraction (I-00-40357) served May 29, 2001, the Government charged the Facility with violations of 29 DCMR 304.4 (failure to notify the Mayor of a change in operation of a child development facility); 29 DCMR 311.1 (prohibiting the inspection of a child development facility); 29 DCMR 315.2 (failure by director to supervise child development facility); 29 DCMR 316.2 (failure to maintain required child staff ratio); and 29 DCMR 320.7 (failure to cooperate with District officials). The Notice of Infraction charged that the alleged violations occurred or were determined to have occurred on March 30, 2001 and May 15, 2001 at 1351-B H Street, NE. The Government sought a fine of \$500 for the alleged violations of 29 DCMR 311.1 and 29 DCMR 316.2; \$100 for the alleged violation of 29 DCMR 320.7; and \$50 for the alleged violations of 29 DCMR 304.4 and 29 DCMR 315.2, for a total of \$1200. Pursuant to D.C. Official Code § 1802.02(a)(3) (2001), the Facility entered a timely plea of Deny to all of the charges set forth in the Notice of Infraction and a hearing was scheduled in the matter.

C. The Consolidated Hearing

Upon the Facility's motion, the Government's consent thereto, and in the interest of judicial economy, the Facility's pending non-renewal action and the Notice of Infraction (00-40357) were consolidated for hearing purposes on July 13, 2001. A hearing was held on August

21, 2001, September 13, 2001 and September 14, 2001.² Appearing on behalf of the Government was Carmen Johnson, Esquire. Human Services Licensing Specialists April Bramble and Pushpa Agarwal, and Denise Ryles McCoy, supervisor of the Child Development Facilities Branch of the Department of Health, testified as witnesses for the Government. Appearing on behalf of the Facility was Catherine Thomas-Pinkney, Esquire. Sylvester Okpala, owner of the Facility and licensee, Pamela Okpala, Director of the Facility and Teacher, and Veronica Young, parent of “D.B.,” one of the children utilizing the Facility, testified as witnesses for the Facility.³ The Government offered Petitioner’s Exhibits (“PX”) 101-114 into evidence which, except for PX 112 (Fire Department Memorandum, 6/12/01) and Ms. Bramble’s writing of “delivered through rod iron bars” on PX 110-B, were admitted. The Facility offered Respondent’s Exhibits (“RX”) 203-207 into evidence, which were admitted.⁴

² As a preliminary matter, the Government moved to amend the charge of the Facility’s violating 29 DCMR 325.13 as set forth in the Non-Renewal Notice to a charge under 29 DCMR 326.7(k). The Facility opposed the motion largely on the ground that it did not have sufficient time to prepare a defense for the proposed new charge. Given the timing of the Government’s motion, and the fact that the employee health reporting requirements for compliance with 29 DCMR 326.7(k) are materially different from the requirements for compliance with 29 DCMR 325.13, I denied the Government’s motion. *Cf. DOH v. Multi-Therapeutic Services, Inc.*, OAH No. I-00-40121 at 3 (Final Order, November 29, 2001). Accordingly, the Government withdrew its charge of 29 DCMR 325.13 as set forth in the Non-Renewal Notice, and I have, therefore, dismissed it.

³ Initials have been used in this Final Order and Proposed Decision to protect the privacy of minors referenced in these proceedings.

⁴ In addition, the Facility had offered RX 201(A-B) into evidence which were not admitted because the underlying charge to which they related had been withdrawn by the Government. *See* note 2 *supra*. The Facility also offered exhibits RX 208(A-H) into evidence. In light of the Government’s stipulation during the hearing that the relevant issue in the case related to access to, as opposed to the existence of, the Facility’s Child Health Records, RX 208(A-H) were not admitted.

II. Findings of Fact

Based upon the testimony of the witnesses, my evaluation of their credibility, the admitted documentary evidence, and the entire record herein, I now make the following findings of fact:

1. At all relevant times, the Facility was a child development center and child development facility⁵ operating in the District of Columbia and licensed to care for children from the age of 2 years to 4 years old. The Facility is located on the top level of 1351-B H Street, above a “Dollar Bill Store” which is on the street level. There are two doors on the street level at 1351-B H Street – one leading to the Dollar Bill Store and the other to the Facility.⁶ Persons accessing the Facility from the street-level need to climb approximately thirty (30) stairs. In addition, there is a metal-gated access door inside the Dollar Bill Store that allows access to the Facility upstairs. Sylvester Okpala is the owner of, and licensee for, the Facility. Pamela Okpala is the Director of the Facility and also serves as the Facility’s only teacher. RX 207.

⁵ A “child development facility” can be known as a child development center, child development home, or infant care center. 29 DCMR 399.1. A “child development center” is defined as a “child development facility for more than five (5) children or infants, which provides a full-day (more than four (4) but less than twenty-four (24) hours per day), part-day (up to four (4) hours per day), or before and after school child development program, including programs provided during school vacations.” *Id.*

⁶ The door to the Facility does not have an operating doorbell. Children in the neighborhood sometimes played with this doorbell when it operated.

A. The Government's Attempt to Inspect the Facility on March 20, 2001

2. On March 20, 2001, Ms. Agarwal visited the Facility at approximately 9:30 AM in order to conduct a license renewal inspection. Based on the most current activities schedule provided by the Facility to the Government and which was reviewed by Ms. Agarwal prior to the visit, the Facility was scheduled to have "Free Play/Learning Centers" at 9:30 AM. PX 113.⁷ Ms. Agarwal knocked on the door of the Facility but no one answered. After telephoning the phone number

⁷ There is conflicting evidence in the record as to which activities schedule was in effect on the various site visit days discussed herein. The Government contends that the schedule contained in PX 113 was the most current schedule in its files, and that the inspectors consulted this schedule in determining when to visit the Facility. The Facility contends, however, that the schedule contained in RX 202 was in effect as of January 2, 2001. Mr. Okpala testified that, while PX 113 may have reflected the Facility's operations schedule at one time, RX 202 reflected the current schedule, and he mailed it, without a cover letter, to Ms. Agarwal at the Department of Health and to the Department of Human Services ("DHS"), Office of Early Childhood Development ("OECD") on or about January 2, 2001. Depending upon which schedule was in effect, the parties suggest, the inspectors may not always have been able to gain access to the Facility. *Compare* PX 113 (designating 10:00 AM as "Free Play/Learning Center") *with* RX 202 (designating 10:00 AM as "Outdoor Activities").

Although Mr. Okpala testified that he mailed the new schedule to Ms. Agarwal and DHS, there is no documentary evidence in the record of either mailing. Moreover, Mr. Okpala's testimony was vague in response to the Government's questions regarding the precise addresses he used to mail the schedule. *See Thomas v. District of Columbia Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985) (noting that general presumption that document that is mailed, and not returned, is received by the addressee is inapplicable where there is no proof of addressor's mailing or mailing procedures). Under the current regulatory scheme, the licensee bears the burden of ensuring that the Government is kept apprised of such operational changes. *See* 29 DCMR 304.4. In light of Ms. Agarwal's and Ms. Bramble's testimony that PX 113 was the most current schedule in the Facility's file, Mr. Okpala's testimony that he mailed RX 202, without more, simply does not satisfy this burden. *See Thomas*, 490 A.2d at 1164. I find, therefore, that the schedule set forth in PX 113 was the most current schedule provided by the Facility to the Government reflecting the Facility's operations and conclude that, as a matter of law, it was the schedule in effect at the Facility at all relevant times herein. *DOH v. Easter Seals Society, Inc.*, OAH No. I-00-40102 at 10 (Final Order, February 7, 2001) (holding that proper 29 DCMR 304.4 notice must be given to the Department of Health in advance for child development facility programming change to be deemed effective).

for the Facility but reaching the Dollar Bill Store below the Facility, Ms. Agarwal then entered the store. Ms. Okpala's son, Mario Washington, was tending the store. Ms. Agarwal asked Mr. Washington if he could open the door to the Facility. Mr. Washington advised Ms. Agarwal that, according to Ms. Okpala, no one was authorized to open the door of the Facility when Ms. Okpala was not there.⁸

3. Mr. Washington then telephoned Ms. Okpala and gave the phone to Ms. Agarwal. Ms. Okpala advised Ms. Agarwal that she was not currently at the Facility, and that, while there were children upstairs at the Facility, no one could open the door of the Facility without her being there. Ms. Okpala advised Ms. Agarwal that she would arrive at the Facility within an hour. Deciding that she did not wish to wait for Ms. Okpala, Ms. Agarwal then prepared a Notice of Attempt to Conduct Inspection form at approximately 10:00 AM and left it with Mr. Washington for Ms. Okpala. PX 101.
4. Ms. Bramble, who had been in telephone contact with Ms. Agarwal that morning, subsequently arrived at the Facility and met Ms. Agarwal there. Convincing Ms. Agarwal to remain at the site a little longer, Ms. Bramble then telephoned Mr. Okpala who advised her that he would be at the Facility in fifteen minutes. Mr. Okpala subsequently arrived at the Facility and opened the Facility's door for Ms. Agarwal and Ms. Bramble. Once inside the Facility, Ms. Agarwal and Ms. Bramble observed a group of six (6) children in a room playing at a table and

⁸ Mr. Washington also served as a part-time teacher's aide at the Facility from August 1, 2000 to March 10, 2001 and from August 2, 2001 to the present. RX 207.

accompanied only by Crystal Morris.⁹ PX 103. Although Ms Bramble testified that, based on a January, 2001 visit to the Facility, she believed at least one of the children in the group was 2 years old, neither Ms. Bramble nor Ms. Agarwal specifically determined the names or ages of the children observed on March 20, 2001.

5. During the inspection, Ms. Agarwal asked Mr. Okpala for access to the Facility's staff and children's files. Mr. Okpala advised her that he did not have the key to access the files at that time. Ms. Okpala then entered the Facility, and became vocally upset by the inspection. Ms. Bramble and Ms. Agarwal then terminated the inspection prior to its completion and left the premises. PX 104.

B. The Government's Attempt to Inspect the Facility on March 27, 2001

6. On March 27, 2001 at approximately 10:30 AM, Ms. Agarwal again visited the Facility to conduct the license renewal inspection. Based on the most current activities schedule provided by the Facility to the Government and which was reviewed by Ms. Agarwal sometime prior to the visit, the Facility was scheduled to have "Clean-up/Toiletry" at 10:30 AM. PX 113. Ms. Agarwal knocked on the door of the Facility but no one answered. After her attempt to contact someone in the Facility by telephone was unsuccessful, Ms. Agarwal entered the Dollar Bill Store and spoke with Mr. Washington who advised her that her that no one was

⁹ Ms. Morris served as a teacher's aide at the Facility from January 22, 2001 until July 5, 2001. RX 207.

upstairs. Ms. Agarwal then prepared a Notice of Attempt to Conduct Inspection form and left it with Mr. Washington for Ms. Okpala. PX 102; PX 104.

C. The Government's Inspection of the Facility on March 30, 2001

7. On March 30, 2001 Ms. Agarwal and Ms. Bramble re-visited the Facility at approximately 9:30 AM. Ms. Bramble conducted a pre-inspection survey in response to the Facility's anticipated expansion, and assisted Ms. Agarwal in conducting a license renewal inspection of the Facility. PX 107. There were six (6) children in the Facility that day. Ms. Okpala and Ms. Morris were in attendance. PX 109. Ms. Agarwal and Ms. Bramble completed the license renewal inspection that day. PX 104. As indicated on the March 30, 2001 Statement of Deficiencies and Plan of Correction, however, the inspectors noted several deficiencies at the Facility on that date which required a follow-up inspection. *Id.*

D. The Government's Attempt to Inspect the Facility May 7, 2001

8. On May 7, 2001 at approximately 10:40 AM, Ms. Agarwal visited the Facility to conduct the follow-up license renewal inspection. Based on the most current activities schedule provided by the Facility to the Government and which was reviewed by Ms. Agarwal sometime prior to the visit, the Facility was scheduled to have "Clean-up/Toiletry" at 10:40 AM. PX 113. Ms. Agarwal knocked on the

door of the Facility but no one answered. After her attempt to contact someone at the Facility by telephone was unsuccessful, Ms. Agarwal entered the Dollar Bill Store and spoke with Mr. Washington who advised her that no one was upstairs. Ms. Agarwal then prepared a Notice of Attempt to Conduct Inspection form and left it with Mr. Washington for Ms. Okpala. PX-104; PX-105.

E. The Government's Attempt to Inspect the Facility on May 15, 2001

9. On May 15, 2001 at approximately 2:00 PM, Ms. Agarwal visited the Facility to attempt a follow-up license renewal inspection. Based on the most current activities schedule provided by the Facility to the Government and which was reviewed by Ms. Agarwal sometime prior to the visit, the Facility was scheduled to have "Nap/Rest period" at 2:00 PM. PX 113. Ms. Agarwal knocked on the door of the Facility but no one answered. She then went to the Dollar Bill Store where Mr. Washington advised her that he believed the children and staff of the Facility may have been engaged in outdoor activities, but was uncertain as to their whereabouts. Ms. Agarwal subsequently mailed a Notice of Attempt To Conduct Inspection to the Facility on May 16, 2001. PX-104; PX-106.

F. The Government's Delivery of Official Correspondence to the Facility on May 25, 2001

10. On May 25, 2001 at approximately 2:15 PM, Ms. Bramble visited the Facility in order to deliver a letter dated May 24, 2001 to Ms. Okpala from Denise Pope of the Health Regulation Administration.¹⁰
11. Ms. Bramble knocked on the door of the Facility, but received no response. Ms. Bramble then proceeded to the Dollar Bill Store and spoke to Mr. Washington. Mr. Washington advised her that Ms. Okpala was not upstairs, but that Ms. Morris was upstairs. Mr. Washington proceeded to telephone someone, and subsequently opened a door inside the store which lead to a metal gate.
12. Ms. Morris later appeared on the other side of the metal gate. Ms. Morris advised Ms. Bramble that she did not have a key to the gate and therefore could not open it. Ms. Morris further advised Ms. Bramble that Ms. Okpala was not at the Facility, and that Ms. Morris was currently attending to five (5) children in the Facility. PX-110-B. Ms. Bramble handed the letter to Ms. Morris through the gate and Ms. Morris signed a receipt for the letter. *Id.* Ms. Bramble did not ask to go upstairs to the Facility.
13. There is conflicting evidence in the record as to whether Ms. Okpala was at the Facility at the time of Ms. Bramble's visit on May 25, 2001. According to Ms.

¹⁰ The letter noted the difficulty that inspectors had been having in "gaining entrance to your facility to conduct unannounced on-site license inspections" and advised Ms. Okpala that an on-site inspection of the Facility would be conducted within five (5) business days of receipt. PX-110-A.

Bramble, both Mr. Washington and Ms. Morris advised her that Ms. Okpala was not at the Facility at the time of Ms. Bramble's visit. The contemporaneously-created documentary evidence, signed by Ms. Morris, supports Ms. Bramble's testimony. *See* PX-110-B. Ms. Okpala testified that she was in the back of the Facility at the time of Ms. Bramble's visit, and scolded Ms. Morris for not apprising her immediately of the visit. Neither Ms. Morris nor Mr. Washington were called to testify on this issue. I find by a preponderance of the evidence in the record, therefore, that Ms. Okpala was not at the Facility at the time of Ms. Bramble's visit on May 25, 2001.

G. The Government's Attempt to Inspect the Facility on June 1, 2001

14. On June 1, 2001, Ms. Agarwal, Ms. Bramble and Connie Watkins of the Department of Human Services ("DHS"), Office of Early Childhood Development ("OECD")¹¹, visited the Facility to conduct a follow-up inspection of the Facility's March 30, 2001 license renewal inspection. Ms. Agarwal arrived first at the Facility at approximately 9:30 AM and remained in her car. Ms. Bramble arrived sometime later and joined Ms. Agarwal in Ms. Agarwal's car. After a short time, Ms. Agarwal and Ms. Bramble observed Ms. Okpala open the door of the Facility from the inside, step outside the Facility and close the Facility's door. Ms. Okpala then turned and observed the car with Ms. Agarwal

¹¹ According to Mr. Okpala, as of June 1, 2001, all of the children at the Facility received childcare subsidies from the Government. *See generally* 29 DCMR 308 (pay rates for child care centers).

and Ms. Bramble and re-entered the Facility. Ms. Agarwal and Ms. Bramble remained in the car.

15. Ms. Watkins subsequently arrived and, accompanied by Ms. Bramble and Ms. Agarwal, knocked on the door of the Facility. Ms. Okpala opened the door for the inspectors and the inspectors identified themselves and stated their purpose for the visit.¹² Everyone then proceeded upstairs. Once upstairs, the inspectors requested the Facility's staff and children's records. Ms. Okpala, who admitted during her testimony that she was upset by the inspection, questioned the purpose of the inspectors' visit and did not retrieve the files requested by the inspectors at that time. Instead, Ms. Okpala stated that she had to telephone her husband. After Ms. Okpala's telephone conversation, she retrieved the Facility's records for the inspectors.
16. Ms. Okpala remained upset, and began walking back and forth in the Facility, shouting at the inspectors and complaining of harassment. Ms. Watkins stated that she would call the police and "terminate the children" if Ms. Okpala continued her behavior. Ms. Okpala then requested that Mr. Lemons, a parent who was in the Facility at the time, come to the area where the inspection was taking place in order to serve as a witness. Ms. Okpala telephoned another parent, Robin Lewis, for assistance. Ms. Lewis, who was in the neighborhood of the Facility at the time, arrived a short time later. Mr. Okpala also later arrived at the

¹² Ms. Agarwal and Ms. Bramble advised Ms. Okpala that they were there for the follow-up inspection. Ms. Watkins advised Ms. Okpala that she was there with respect to the Facility's Government subsidies.

Facility and attempted to calm Ms. Okpala. Mr. Okpala, who also became upset, began questioning in a loud voice what was taking place.

17. Ms. Agarwal and Ms. Watkins proceeded with reviewing the Facility's files, and noted several regulatory deficiencies based on that review.¹³ Ms. Agarwal then telephoned her supervisor Ms. Pope, who, upon hearing the activity in the background which Mr. Okpala testified as being "chaos", advised Ms. Agarwal to terminate the inspection and leave the Facility. The inspectors then left the Facility without completing the follow-up inspection.
18. Later that day, Ms. Agarwal mailed the Facility a Statement of Deficiencies And Plan Of Correction based upon that portion of the follow-up investigation that had been completed.¹⁴ PX 108. Among the deficiencies noted by Ms. Agarwal and Ms. Bramble on June 1, 2001 was that, while the Facility was licensed to care for children from the age of 2 to 4 years old, the Facility had admitted a 6 year-old child ("D.H.") and a 5 year-old child ("I.H."). See PX-108; Non-Renewal Notice at 4. Although application records relating to D.H. and I.H. were maintained in the Facility's files, neither D.H. nor I.H. had actually been admitted to the Facility as of June 1, 2001. RX 203-206.

¹³ While Ms. Agarwal and Ms. Watkins reviewed the Facility's files, Ms. Bramble was engaged with Ms. Okpala over Ms. Bramble's attempt to close the door of the file room in order to avoid the children hearing, and being upset by, the shouting taking place there. Seven (7) children were in attendance at the Facility on June 1, 2001. RX 205.

¹⁴ By letter dated June 19, 2001 from Kathy Manning of DHS to Ms. Okpala, DHS advised Ms. Okpala that, among other things, it was unable to complete its inspection of the Facility on June 1, 2001 "because of the conduct you exhibited as the Director," and that, effective June 1, 2001, OECD

H. Respondent's Remedial Measures

19. Subsequent to the June 1, 2001 attempted follow-up inspection, the Facility has undertaken various improvement initiatives to address the deficiencies raised by the inspectors, including, among other things, attempting to ensure that the Facility's Director is present at all times during the Facility's operating hours, and hiring, as appropriate, additional staff to ensure the maintenance of adequate child-staff ratios. *See* RX 207.

III. Conclusions of Law

A. Non-Renewal Notice

In the June 15, 2001 Non-Renewal Notice, the Government notified the Facility that, pursuant to 29 DCMR 306.1(a), its license would not be renewed. Pursuant to 29 DCMR 306.1(a), the Mayor may refuse to renew a license if he or she finds, among other things, a “[f]ailure to comply with the provisions of [Title 29 Chapter 3].” As such, an adjudged violation of Title 29 Chapter 3 can, in the exercise of the Government's considered discretion, serve as a legitimate basis for non-renewal of a license. *See DOH v. Tots Nursery School*, OAH No. C-00-80001 at 4-5 (Final Order, November 14, 2000).

had stopped placing DHS eligible children with the Facility in light of the Department of Health's proposed non-renewal of the license for the Facility. PX 114.

The Government has based its proposed action on five charges: (1) alleged violations of 29 DCMR 311.1 on or about March 20, 2001, March 27, 2001, May 7, 2001, May 15, 2001 and June 1, 2001; (2) alleged violation of 29 DCMR 325.13 on or about March 30, 2001; (3) alleged violations of 29 DCMR 316.2 on or about March 20, 2001 and May 25, 2001; (4) alleged violation of 29 DCMR 326.1 on or about March 20, 2001; and (5) alleged violation of 29 DCMR 301.6 on or about June 1, 2001. As noted earlier in this order, the Government has withdrawn its allegation of the Facility's violation of 29 DCMR 325.13. Therefore, the legal sufficiency of each of the four remaining charges will be dressed seriatim.

1. Charge I: 29 DCMR 311.1 (failure to permit an inspection of the premises)

The Government charged the Facility with violating 29 DCMR 311.1 on or about March 20, March 27, May 7, May 15 and June 1, 2001. 29 DCMR 311.1 provides:

The Mayor and any other duly authorized official of the District having jurisdiction over, or responsibilities pertaining to, any child development facility, after presenting official credentials of identification and authority issued by the District, shall have the right either with or without prior notice, to enter upon and into the premises of any child development facility licensed under this chapter, or for which an application for licenses has been made, in order to determine compliance and to facilitate verification of information submitted on or in connection with an application for licensure pursuant to provisions of this chapter. The conduct of the authorized official shall be such that the entry and inspection shall take place with the least possible disruption to the program.

(Emphasis supplied.)

On March 20, 2001, Ms. Agarwal and Ms. Bramble attempted to conduct license renewal inspection at the Facility during its normal hours of operation, initially could not gain access and, due to Ms. Okpala's behavior and Mr. Okpala's inability to locate the key to the Facility's files, could not complete the inspection once inside. Findings of Fact ("FOF") at ¶¶ 2-5; PX 101; PX 104; PX 113. On March 27, 2001, Ms. Agarwal again attempted to complete the license renewal inspection at the Facility during its normal hours of operation but could not gain access. FOF at ¶ 6; PX 102; PX 104; PX 113. On May 7, 2001, Ms. Agarwal attempted to conduct a follow-up license renewal inspection at the Facility during its normal hours of operation but could not gain access. FOF at ¶ 8; PX 104; PX 105; PX 113. On May 15, 2001, Ms. Agarwal again attempted to conduct a follow-up license renewal inspection at the Facility during its normal hours of operation but could not gain access. FOF at ¶ 9; PX 104; PX 105; PX 113. Finally, on June 1, 2001 Ms. Agarwal and Ms. Bramble, along with Ms. Watkins of the Department of Human Services, attempted to conduct a follow-up license renewal inspection at the Facility but, due to Ms. Okpala's and Mr. Okpala's behavior, could not complete the inspection. FOF at ¶¶ 14-17; PX 114.

The inability of inspectors to conduct and complete a lawful inspection of a child development facility has previously been deemed by this administrative court to be a very serious matter. *See generally DOH v. Agape, Cabbage Patch & LeMae's Early Learning Child Development Center*, OAH No. I-00-40362 at 13-15 (Final Order and Order Denying Respondents' Motion to Dismiss, October 29, 2001); *see also Rush v. Obledo* 756 F.2d 713 (9th Cir. 1985). At stake is nothing less than the health and safety of some of our most vulnerable citizens: our children. Indeed, this administrative court has observed:

With respect to 29 DCMR 311.1, the regulation at issue is a key part of a regulatory scheme to protect children from reasonably avoidable risks in a childcare setting. Respondents, as licensees in a regulated business, bear the burden of avoiding unsafe and illegal conditions. The process of subjecting a business to regular state-sponsored inspections is a critical component of a governmental health and safety compliance program. **In electing to provide services in a highly regulated industry such as childcare, a licensee must make its facility open and accessible to all necessary inspections. . . . An inspector's inability to promptly inspect a facility places the health and safety of the children at heightened risk from undiagnosed and uncorrected dangers . .**

DOH v. Jewels of Ann Private School, OAH No. I-00-40204 at 9-10 (Final Order, June 29, 2001)
(emphasis supplied).

By repeatedly failing to have its Facility accessible to the Government for inspection during regular hours of operation, I conclude that the Facility violated 29 DCMR 311.1 on March 27, May 7, and May 15, 2001 as charged in the Non-Renewal Notice. Non-Renewal Notice at 1-3. Moreover, by knowingly and repeatedly creating an environment in which the inspectors were unable to complete a lawful inspection of the Facility in those few instances where access was obtained, I conclude the Facility also violated 29 DCMR 311.1 on March 20 and June 1, 2001 as charged in the Non-Renewal Notice. *Id.*; see also *Agape, Cabbage Patch & LeMae's Early Learning Child Development Center*, OAH No. I-00-40362 at 13-15; *Jewels of Ann Private School*, OAH No. I-00-40204 at 9-10.

2. Charge III: 29 DCMR 316.2 (failure to maintain child staff ratio)

The Government also charged the Facility with violating 29 DCMR 316.2 on or about March 20, 2001 and May 25, 2001. 29 DCMR 316.2 provides:

There shall be a teacher, who may also be the director, and an assistant teacher or aide for each group at all times. In part-day programs (up to four (4) hours per day), a volunteer may be substituted for an assistant teacher or aide. During non-peak hour[s] (before 8:30 a.m. and after 4:30 p.m.), an assistant teacher may substituted for a teacher.

On March 20, 2001, Ms. Agarwal and Ms. Bramble observed a group of six (6) children in a room playing at a table and accompanied only by Ms. Morris, a teacher's aide. FOF at ¶ 4. On May 25, 2001, Ms. Bramble was advised by Ms. Morris and Mr. Washington that, while five (5) children were present at the Facility, Ms. Okpala was not present. FOF at ¶ 12. Because I have previously found that Ms. Okpala, who is the Facility's only teacher, was not at the Facility at the time of the inspectors' visits to the Facility on March 20 and May 25, 2001, I conclude that the Facility violated 29 DCMR 316.2 on March 20 and May 25, 2001.¹⁵ FOF at ¶¶ 4, 5, 13.

¹⁵ While Mr. Washington sometimes served as a teacher's aide at the Facility and was present on the May 25, 2001, the "non-peak hour" exception to the requirement of 29 DCMR 316.2 that a teacher be present at all times is inapplicable in this case for two reasons. First, the May 25, 2001 inspector's visit occurred at approximately 2:15 PM whereas, under the subject regulation, non-peak hours are defined as being before 8:30 AM and after 4:30 PM. FOF at ¶ 10. Second, Mr. Washington was not employed as a teacher's aide at the Facility on May 25, 2001. RX 207.

3. Charge IV: 29 DCMR 326.1 (failure to make required records available for inspection as directed)

The Government charged the Facility with violating 29 DCMR 326.1 on March 20, 2001. 29 DCMR 326.1 provides: “The records required by this section shall be maintained for three (3) years by the caregiver or director of a child development facility and shall be forwarded to or made available to the Mayor for inspection as directed.” Because of Mr. Okpala’s misplacement of the Facility’s files key, the records required to be maintained by the Facility under 29 DCMR 326.1 were not made available to the inspectors during the inspection as had been directed. FOF at ¶ 5; *see DOH v. Symbral Foundation, Inc.*, OAH No. 00-40047 at 3-4 (Final Order, May 12, 2000). Accordingly, the Facility violated 29 DCMR 326.1 on March 20, 2001.

4. Charge V: 29 DCMR 301.6 (failure to set forth child care facility specifications)

Finally, the Government charged the Facility with violating 29 DCMR 301.6 on June 1, 2001. 29 DCMR 301.6 provides: “Each licensee shall set forth the name and address of the premises of the child care facility, the name of the licensee, and the maximum number of infants and children to be accommodated.” The Government based its charge on the following allegations:

On or about June 1, 2001, April Bramble and Pushpa Agarwal, Department of Health Human Services Licensing Specialists, and Connie Watkins, from the Office of Early Childhood Education, observed during an attempt to conduct a follow-up license renewal inspection that, while you are licensed to care for children two (2) to four (4) years old, one (1) child in your facility was five (5) years old and one (1) child in your facility was six (6) years old.

Non-Renewal Notice at 4.

Because I have found that the children referred to in the Government's charge, D.H. and I.H., had not been admitted to the Facility as of June 1, 2001, *see* FOF at ¶ 18, and the Government has provided no other factual basis for this charge, I conclude that the Government has not met its statutory burden of proof in establishing the Facility's violation of 29 DCMR 301.6 as charged. *See Agape, Cabbage Patch & LeMae's Early Learning Child Development Center*, OAH No. I-00-40362 at 12-13; D.C. Official Code § 2-1802.03(a) (2001).

Accordingly, the Government has established that Respondent violated the provisions of Chapter 3 of Title 29 at least eight separate times over the course of some four months. Therefore, the Government has met its burden pursuant to 29 DCMR 306.1 of proving that Respondent failed to comply with at least one regulation contained in 29 DCMR Chapter 3, and its decision to not renew Respondent's license must be affirmed. *Accord Jewels of Ann Private School*, OAH No. I-00-40204 at 7; *see also Tots Nursery School*, OAH No. C-00-80001 at 4-5 (noting non-renewal is a rational exercise of the Government's statutory enforcement discretion where "[r]espondents' persistent, uncorrected, and substantial regulatory violations created a significant risk to the health, safety, and welfare of young children.").

B. Notice of Infraction (I-00-40357)

1. 29 DCMR 304.4 (failure to notify Department of change in operation)

With respect to the Notice of Infraction, the Government has charged the Facility with a single violation of 29 DCMR 304.4 on March 30, 2001 and/or May 15, 2001.¹⁶ 29 DCMR 304.4 provides: “The licensee of a child development facility shall inform the [Department of Health] of any change in the operation, program, or services of a child development facility of a degree or character which may affect its licensure.”

Mr. Okpala is the owner of, and licensee for, the Facility. FOF at ¶ 1. The Notice of Infraction did not charge Mr. Okpala with the violation of 29 DCMR 304.4, however; it charged only the Facility.¹⁷ Because the Facility was not the licensee in this instance, it had no obligation under 29 DCMR 304.4 to keep the Government apprised of operational changes. Even assuming, *arguendo*, Mr. Okpala acted as an agent of the Facility, his failure to perform his own obligation under 29 DCMR 304.4 as a licensee will not ordinarily be imputed to the principal, *i.e.*, the Facility, in the absence of a law, regulation or other legal authority permitting such liability. *See, e.g., PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 672 (Cal. Ct. App. 2000) (noting agent is liable for his or her own wrongful acts, regardless of whether the principal is liable); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120-21 (7th Cir. 1974) (noting that it is well

¹⁶ As this administrative court noted during the hearing, the charges set forth in Notice of Infraction I-00-40357 reference a collective date of occurrence to be “3/30/01, 5/15/01” and a collective time of occurrence to be 2:00 P.M. I construe this reference to mean that the infractions occurred on March 30, 2001 at 2:00 PM, or May 15, 2001 at 2:00 PM, or both.

established that agents are held liable for their own unlawful conduct); *cf.* 16 DCMR 3201.4. No such theory of imputed liability has been raised in this case. Accordingly, this charge against the Facility shall be dismissed.

2. 29 DCMR 311.1 (failure to permit an inspection of the premises)

The Government charged the Facility with a single violation of 29 DCMR 311.1 on March 30, 2001 and/or May 15, 2001. 29 DCMR 311.1 provides:

The Mayor and any other duly authorized official of the District having jurisdiction over, or responsibilities pertaining to, any child development facility, after presenting official credentials of identification and authority issued by the District, shall have the right either with or without prior notice, to enter upon and into the premises of any child development facility licensed under this chapter, or for which an application for licenses has been made, in order to determine compliance and to facilitate verification of information submitted on or in connection with an application for licensure pursuant to provisions of this chapter. The conduct of the authorized official shall be such that the entry and inspection shall take place with the least possible disruption to the program.

(Emphasis supplied.)

By failing to have its Facility accessible to the Government for inspection during regular hours of operation, *see* FOF at ¶ 9, I conclude that the Facility violated 29 DCMR 311.1 on May 15, 2001 as charged. A fine of \$500 is authorized for this violation which, given the seriousness of the violation and the potential harm to children enrolled in the Facility arising from such a

¹⁷ There is no evidence in the record as to the corporate status of the Facility.

violation, shall be imposed without reduction. 16 DCMR 3222.1(f). *See Agape, Cabbage Patch & LeMae's Early Learning Child Development Center*, OAH No. I-00-40362 at 13-15; *Jewels of Ann Private School*, OAH No. I-00-40204 at 9.

3. 29 DCMR 315.2 (failure to provide supervision and administration)

The Government has charged the Facility with a single violation of 29 DCMR 315.2 on March 30, 2001 and/or May 15, 2001. 29 DCMR 315.2 provides that the director of a child development facility be responsible for “supervision and administration of the child development center, **including** the following” (emphasis supplied). The regulation then sets out eight specific supervisory and administrative tasks (subparts a through h), ranging from the selection of qualified staff to the development of parent involvement in the child development program. *See* 29 DCMR 315.2(a)-(g).

The regulation inserts the term “including” prior to listing the eight supervisory and administrative tasks for the director of a child development facility. 29 DCMR 315.2. I do not, however, construe this term as creating an exhaustive task list. Rather, this term creates an illustrative task list which includes supervisory and administrative tasks that, although not expressly set out, are in keeping with the responsibilities of a director of a child development facility. *See, e.g., United States v. Grassie*, 237 F.3d 1199, 1215 (10th Cir. 2001) (noting statutory use of the word “including” operates as a “preface for a representative or illustrative example, and not as a term of restriction or exclusion for anything not expressly specified”).

Although the Facility was scheduled to have “Nap/Rest period” at the time of Ms. Agarwal’s attempted follow-up license inspection on May 15, 2001, no one was available at the Facility to allow her to gain access. FOF at ¶ 9. By failing to be available at the Facility at the time of the attempted inspection, or, in the alternative, failing to make other lawful arrangements, I conclude that Ms. Okpala violated 29 DCMR 315.2 on May 15, 2001.

The Notice of Infraction did not charge Ms. Okpala with the violation, however; it charged only the Facility. In contrast to the Government’s charged violation of 29 DCMR 304.4 discussed above, the law clearly provides that, as the Facility’s director, Ms. Okpala’s liability for violating 29 DCMR 315.2 can be imputed to the Facility. 16 DCMR 3201.4. A fine in the amount of \$50 is authorized for this violation which, in light of the serious nature of the violation, shall be imposed upon the Facility without reduction. 16 DCMR 3222.3.

4. 29 DCMR 316.2 (failure to maintain required child staff ratios)

The Government has charged the Facility with a single violation of 29 DCMR 316.2 on March 30, 2001 and/or May 15, 2001. 29 DCMR 316.2 provides:

There shall be a teacher, who may also be the director, and an assistant teacher or aide for each group at all times. In part-day programs (up to four (4) hours per day), a volunteer may be substituted for an assistant teacher or aide. During non-peak hour[s] (before 8:30 a.m. and after 4:30 p.m.), an assistant teacher may substitute for a teacher.

On March 30, 2001 Ms. Agarwal and Ms. Bramble completed a license renewal inspection of the Facility. PX 107. There were six (6) children in the Facility that day. Ms. Okpala, the Facility's director and teacher, and Ms. Morris, a teacher's aide, were in attendance. PX 104; PX 109; RX 207. The inspectors concluded there was no violation of 29 DCMR 316.2 on March 30, 2001. PX 109.

On May 15, 2001, Ms. Agarwal attempted to conduct a follow-up license renewal inspection but could not gain access to the Facility. Although advised by Mr. Washington in the Dollar Bill Store that he thought the Facility's staff and children were engaged in outdoor activities, Ms. Agarwal could not actually determine the number of staff or children that may have been present at the Facility that day. As such, the Government has not met its burden of proof as to the Facility's alleged violation of 29 DCMR 316.2 on May 15, 2001, and that charge shall be dismissed.¹⁸ See D.C. Official Code § 2-1802.02(a) (2001).

5. 29 DCMR 320.7 (failure to comply with a requirement for caregivers in child development homes)

Finally, the Government has charged the Facility with a single violation of 29 DCMR 320.7 on March 30, 2001 and/or May 15, 2001. 29 DCMR 320.7 provides: "The caregiver shall be responsible for cooperation with District officials trained in child development who are assigned to work with the caregiver in placing and implementing the child development program." The term "caregiver" as used in this regulation is defined as "an individual whose

¹⁸ Of course, evidence in the record of possible inadequate coverage on days other than March 30, 2001 or May 15, 2001 is irrelevant for purposes of the alleged violation as charged in Notice of Infraction (00-40357).

duties include direct care, supervision, and guidance of infants or children *in a child development home.*” 29 DCMR 399.1 (emphasis supplied).

Because 29 DCMR 320.7 applies only to child development *homes*, as opposed to child development *centers* such as the Facility, and there is no evidence in the record that Facility operated as a child development home on March 30, 2001 or May 15, 2001, I conclude that 29 DCMR 320.7 is not applicable to the Facility’s activities on those dates. Accordingly, the Government’s charge must be dismissed.

IV. Proposed Order Regarding Non-Renewal Notice (C-01-80065)¹⁹

Based upon the hearing held in this case and the foregoing findings of fact and conclusions of law, it is, this XXXXXX day of XXXXXXXXXXXX, 2002:

ORDERED, that the Government's proposed revocation of Respondent's license to operate a child development facility is hereby **AFFIRMED** and the Government may revoke the Respondent's license in any manner consistent with applicable law; and it is further

ORDERED that, pursuant to D.C. Official Code § 2-510 (2001), judicial review of this order may be obtained by filing a petition for review with the District of Columbia Court of Appeals. Pursuant to D.C. App. R. 15(a), any such petition must be filed within thirty-five (35) days of the service date of this order stated below.

XXXXXXXXXXXXXXXXXXXX
Mark D. Poindexter
Administrative Judge

¹⁹ As set forth at the end of the Final Order in Case No. I-00-40357, the parties will be permitted to file and serve comments within fourteen (14) calendar days of the order's service date.

V. Final Order Regarding Notice of Infraction (I-00-40357)²⁰

Based upon the foregoing findings of fact and conclusions of law, and the entire record of these proceedings, it is hereby, this _____ day of _____, 2002:

ORDERED, that Respondent is **NOT LIABLE** for the violation of 29 DCMR 304.4 as specified in Notice of Infraction I-00-40357; and it is further

ORDERED, that Respondent is **LIABLE** for the violation of 29 DCMR 311.1 as specified in Notice of Infraction I-00-40357; and it is further

ORDERED, that Respondent is **LIABLE** for the violation of 29 DCMR 315.2 as specified in Notice of Infraction I-00-40357; and it is further

ORDERED, that Respondent is **NOT LIABLE** for the violation of 29 DCMR 316.2 as specified in Notice of Infraction I-00-40357; and it is further

ORDERED, that Respondent is **NOT LIABLE** for the violation of 29 DCMR 320.7 as specified in Notice of Infraction I-00-40357; and it is further

²⁰ The January 17, 2002 “Final Order On Notice Of Infraction And Proposed Decision Affirming Non-Renewal Of License” is hereby vacated.

ORDERED, that Respondent shall pay fines in the total amount of **FIVE HUNDRED FIFTY DOLLARS (\$550)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05 (2001); and it is further

ORDERED, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1) (2001); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f) (2001), the placement of a lien on real or personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i) (2001) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7) (2001); and it is further

ORDERED, that the parties are permitted to file and serve comments on any aspect of this opinion (including the Proposed Order) that is material to the license non-renewal sought by the Government and proposed to be affirmed by this administrative court, within fourteen (14) calendar days from the service date of this Order.

/s/ 1/18/02

Mark D. Poindexter
Administrative Judge